

Emerging Trends in WTO Dispute Settlement

Back to the GATT?

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Abstract

As the number of cases in the World Trade Organization (WTO) dispute settlement system has increased, there has been a greater effort by the academic community to analyze the data for emerging trends. Holmes, Rollo, and Young seek to develop this literature using data up to the end of 2002 to ask whether recent trends confirm previously identified patterns and to examine whether there are divergences from the overall pattern according to the type of dispute. They focus on three questions in particular:

- What explains which countries are most involved in complaints under the dispute settlement understanding?
- Is there a discernible pattern to which countries win?
- Is there a difference to these patterns depending on the type of measure at the heart of the complaint?

The authors find that:

- A country's trade share is a pretty robust indicator of its likelihood to be either a complainant or a respondent.
- The frequently remarked absence of the least developed countries from the dispute settlement system can be explained by their low volume of trade.
- There is not much, if any, evidence of a bias against developing countries either as complainants or respondents.
- Regulatory issues are fading as reasons for disputes and trade defense disputes are the rising issue.
- Complainants overwhelmingly win (88 percent of cases).
- There is no strong evidence that the rate of completion of cases is biased against newly industrializing countries or traditional less developed countries.

This paper—a product of Trade, Development Research Group—is part of a larger effort in the group to analyze the behavior of the WTO dispute settlement system so as to help developing countries more effectively integrate into the global trade environment. An earlier version of this paper was presented to the World Trade Forum 2002. Copies of the paper are available free from the World Bank, 1818 H Street NW, Washington, DC 20433. Please contact Paulina Flewitt, mail stop MC3-303, telephone 202-473-2724, fax 202-522-1159, email address pflewitt@worldbank.org. Policy Research Working Papers are also posted on the Web at <http://econ.worldbank.org>. The authors may be contacted at p.holmes@sussex.ac.uk, a.young@socsci.gla.ac.uk, or lafd0@central.susx.ac.uk. September 2003. (30 pages)

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Emerging Trends in WTO Dispute Settlement:

Back to the GATT?

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EMERGING TRENDS IN WTO DISPUTE SETTLEMENT: BACK TO THE GATT?

The revisions to the dispute settlement system negotiated in the Uruguay Round and implemented in 1995 have some claim to be the most important revisions made to the post-1947 system of trade rules. They promised a system in which economic power would not, alone, matter in the implementation of the rules. Small countries could take on big with hope of redress. The changes also promised a shift from a politically driven system of negotiated agreements to one where increasingly the normal rules of public international law applied. It further suggested increased potential for clashes between domestic regulatory objectives and systems and international agreements.

The early days of the World Trade Organisation's (WTO) dispute settlement system were dominated by unfinished business from the General Agreement on Tariffs and Trade (GATT) period, notably between the EU and the US. The key cases, Beef Hormones and Bananas in particular, raised strong feelings both on the intrinsic merits of each case and on the legitimacy of the WTO. High profile cases on environmental legislation notably against the US on gasoline and shrimp/turtle brought significant protest about WTO procedures and rules from US environmental non-governmental organisations in particular.

As the number of cases in the system has increased there has been an increasing effort by the academic community to analyse the data for emerging trends. This paper seeks to develop this literature by seeing whether recent trends confirm previously identified patterns and by examining whether there are divergences from overall pattern according to the type of dispute. We focus on three questions in particular:

1. What explains which countries are most involved in complaints under the Dispute Settlement Understanding (DSU)?
2. Is there a discernible pattern to which countries win?
3. Is there a difference to these patterns depending on the type of measure at the heart of the complaint?

We begin with a survey of the literature. We then briefly introduce the data and categories used in our analysis. The third section summarises the data and presents our key findings. We conclude with a discussion of the broader implications of these findings. For reference, the current state of play in the DSU is summarised in Table 1.

Table 1 Statistical Overview as of Jan 17th 2003

| | Complaints notified to the WTO | Active Panels | Appellate Body and Panel Reports Adopted | Mutually Agreed Solutions | Other settled or inactive disputes | Active Compliance Panels | Adopted Appellate Body and Panel compliance reports | Arbitrations on level of suspension of concessions | WTO authorizations of suspension of concessions |
|------------------------|--------------------------------|---------------|--|---------------------------|------------------------------------|--------------------------|---|--|---|
| Reporting period/ date | since 1.1.1995 | on 17.1.03 | since 1.1.1995 | since 1.1.1995 | since 1.1.1995 | on 17.1.03 | on 17.1.03 | on 17.1.03 | on 17.1.03 |
| Number | 279 | 16 | 68 | 40 | 24 | - | 11 | 5 | 5 |

Notes:

This table covers the period up to Jan 17th 2003, but our subsequent data analysis unless otherwise stated only covers the 276 cases up to the end of 2002.

Columns add up to 169 as there were 110 complaints pending consultations.

Source: WTO (2003)

LITERATURE SURVEY

There is by now a well established literature on the WTO dispute-settlement process. Much of it is by eminent lawyers and looks at the systemic implications of cases and groups of cases. But there is in addition a small but growing literature by mainly by political scientists and also economists on the patterns of use of the DSU.

The studies published to date have principally address two issues:

- 1) who uses the DS system?
- 2) what measures are most prone to dispute?

There is also a less developed literature, which is closely related to the first issue, that looks at some of the "law and economics" aspects of the actual process, such as who wins cases and the cost and benefits of settling.

Is use of the DSU biased?

Most attention has been paid to who uses the DS system, and particularly whether developing countries under represented. The point of departure is who are the main users of the DSU? For the answer to be meaningful, however, this pattern must be compared with what one should expect to see. What is an unbiased pattern of usage is a thorny question that the existing literature addresses in different ways.

The simplest statistical study which essentially looks at what has actually happened is that of Park and Umbricht (2001) (see also Jackson (2000)). They observe that the share of cases brought by developed countries (DCs) between 1995 and 2000 was 71%, though the proportion of cases against DCs was 56%. Less developed countries (LDCs) were the targets of 40% of cases and initiated only 26%. At least superficially the system seems to show a bias against LDCs. These measures, however, just look at actual numbers and do not attempt to compare actual case with those "predicted" using a yardstick based on an explicit model as Horn, Mavroidis and Nordström (1999) do.

The data analysis is taken a lot further in the survey by Busch and Reinhardt (2002).² One of the yardsticks they use is to compare usage of the WTO's Dispute Settlement Body (DSB) with that of GATT. In doing so they take account of the changing composition of membership. They find that less developed countries accounted for 31% of complaints under GATT, but only 29% of complaints under the WTO in the period to 2000. The share of cases against LDCs rose from 8% to 37%. These changes contrast with a rise in the index of LDC 'member years' from 66% in GATT to 75% in the WTO, again suggesting the presence of bias against LDCs.

Horn, Mavroidis and Nordström (1999), however, find that the bias may not actually be as great as these findings suggest. They set up a model to predict what one might expect to be the pattern of disputes based on the premise that disputes should be correlated with the number of incompatible measures a country's exporters encounter. This is likely to increase with the volume of trade, but, they argue, not in a strictly linear way. First, there is a threshold below which it is not worth litigating over a particular trade flow. Second, the number of barriers one encounters depends on the number of different products and

² Busch and Reinhardt report on their own statistical analysis as well as that of other authors. Their inspiration is drawn from the work of Hudec (1993).

markets in which one is trading. The authors assume (as is supported by trade data) that in fact there will be a an increase in the “diversity” of barriers encountered as export volumes rise, so that we should see a non-linear relationship between trade volume and barriers encountered. They thus predict that complaints by countries with higher export volumes will be more than proportionately high. Although their analysis is not as nuanced, Busch and Reinhardt (2002) also find that the most active traders and those most dependent on trade are more likely to participate in disputes.

Horn et al (1999) find that their predictive equation explains the rate of disputes rather well (with an r^2 of 0.86). They do, however, find that there are several particularly important outliers. The EU and the US litigate more than they “should”, though Japan does so less. India stands out as an exception of sorts in that that it litigates its fair share of cases despite its low income level. The deviations from the predictions appear to be correlated with income per head, although this does not appear to be statistically significant.

There thus appears to be some evidence that the WTO's dispute-settlement system is biased against LDC, although there is some disagreement about how great the bias is. The question, however, remains what explains the bias. Horn, Mavroidis and Nordström (1999) consider two possible explanations: power and legal capacity. They argue that the data does not support a power interpretation, but they do conclude that legal capacities, may play some role in propensity to bring cases.

There is reason, however, to treat Horn, Mavroidis and Nordström's (1999) conclusion about the lack of importance of power with caution. They find that Organisation for Economic Cooperation and Development countries, including the Quad – Canada, EU, Japan and the US -- target developing countries less than their model predicts, so they suggest that the evidence does not support the claim that power-based factors are important. But this result seems to be very sensitive to the specification of the predictive model.³ The model is based on the idea that a country is likely to encounter trade barriers as a function of the number of pair wise product-markets combinations into which it sells. But since the Quad accounts for only four of 142 WTO members the simplest version of the model predicts that only about 3 percent of total disputes should arise among these partners.⁴

While most of the literature focuses on whether use of DSU by complainants is biased, there is also an issue of who is targeted. This has received much less attention in the literature, and is one lacunae that we begin to address later. It is not clear, for example, how the Horn et al model could predict who might be targeted, since it is largely based on the characteristics of the exporters. Further, although Park and Umbricht (2001) and Busch and Reinhardt (2002) found that LDCs seem to be disproportionately targeted under the DSU, this element in the DSU “imbalance” is quite sensitive to how countries are classified. For example, this category may include newly industrialising countries (NICs) and India, which are both respondents and complainants in significant numbers of cases.

³ Their Table 4a shows that Quad countries “net” litigation is mostly against non-Quad OECD; but their Tables 4b and 4c comparing actual and predicted patterns of cases suggests that the predictions are somewhat counter intuitive and sensitive to the model specification.

⁴ We are extremely grateful to Henrik Horn for pointing this out; he also observes that as the model is adjusted to count only “large” pair wise product-market trade instances its predictions become closer to a trade volume related prediction and the discrepancy lessens.

Busch and Reinhardt (2002) address briefly some factors that affect being targeted, but not with specific reference to developing countries. They note that disputes tend to lead to counter suits (55% of the time) and to others initiating similar disputes against the respondent ('bandwagoning').

It should be added that one conspicuous finding is that the least developed countries, mostly in Sub-Saharan Africa, have had almost no involvement in the DSU.

Who wins and loses

An additional aspect of the bias question, is whether certain types of countries win cases more often. There has been relatively little work done on this question. Busch and Reinhardt (2002) attempt a first cut at who wins for the GATT period and find both that there is a strong tendency for complainants to win and a tendency for decisions to be given in favour of smaller countries.

We are not, however, aware of any comparable studies for the WTO period. One reason for this is some thorny methodological and data problems. Although panel and appellate body reports are made public, they are often difficult to interpret. This is made harder by the fact that the notion of "winning" is often difficult to determine. A decision may find against the respondent on only one of multiple counts, but the true significance of this depends on whether this was vital element in the contested measure. In addition, a Respondent may have a particular measure found incompatible with WTO rules, but win on a central issue of principle, as arguably the US did in Shrimp/ Turtle and the EU did in Beef Hormones.⁵ A very simple measure of who wins cases is to go through the record and to assign a "win" for the complainant if any of the respondent's rules were found to be inconsistent with the WTO on any of the counts. This is the approach we will use here, though there may well be a better method available.

The issue of identifying winners, as Busch and Reinhart (2002), point out, is complicated further by the high number of disputes that never reach the DSU, and a high proportion of those that do, do not result in a panel report (see Table 1). Information on "settled or inactive" cases is especially hard to come by. Though there is a formal obligation to notify settlements this is often ignored and cases drop off the radar screen. Even when agreements are reported, few details are provided.

Nonetheless, Busch and Reinhardt (2002) analysed the pattern of settlements, especially in the GATT period. They found no clear trends in the willingness to settle or to go to a panel, although they did find that pairs of democratic states are most likely to settle disputes before a panel and that open economies (controlling for democracy) are less likely to make concessions.

Bütler and Hauser (2000), in a largely theoretical paper also explore the incentives to litigate, settle and appeal in the context of a formal model. They conclude that a priori the dispute-settlement system provides little disincentive to introduce WTO-inconsistent measures, and quite strong incentives for a respondent against whom a ruling is given by a panel to appeal and delay compliance. This reinforces Busch and Reinhardt's (2002)

⁵ See for example the headline in the Boston Globe 26/7/2002 "Canada, U.S. both claim victory in initial WTO ruling on softwood lumber tariffs"
http://www.boston.com/dailynews/207/economy/Canada_U_S_both_claim_victory_.shtml

point that the only real test of whether a complainant wins is whether there is compliance with any decision that emerges.

What measures are most prone to dispute?

A third issue that has received a fair degree of attention, is what products and measures are most subject to disputes. Much of this analysis, however, has been descriptive. Horn, Mavroidis and Nordström (1999) report the distribution of cases during 1995-98 by product and by agreement both by type of complainant. Park and Umbricht (2001) also look at product types (goods only) and types of measure both by respondent type. There has, however, been relatively little attempt to explain the revealed patterns. Busch and Reinhardt (2002) posit that there are two alternative hypotheses for what cases are brought to the DSB. One possibility is that only cases where there is a good chance of a clear outcome will be brought. The other is that it is only where the rules are unclear that you need a DSB decision. The information on settlements without a panel report leads Busch and Reinhardt to conclude that we cannot settle this issue.

Young (2002), in a qualitative study, suggests that that perhaps there is a “dog that did not bark in the night”: in that a number of significant and quite-longstanding trade barriers stemming from regulatory and environmental issues have not yet been prosecuted before the WTO.

What remains to be explored

There are very detailed analyses of the pattern of usage in earlier years.⁶ There is a clear sense that LDC underused the system. It will be interesting to see if this has evolved in the face of a number of favourable decisions, in particular to see if a number of recent decisions in favour of complainants on anti-dumping has spurred LDCs to litigate these issues more. All this analysis is of course subject to the problem of knowing what the yardstick for comparison should be.

Looking at what complaints come before the WTO two issues stand out. The most under explored area lies in those cases that are not brought and cases that are brought but do not go to a panel. There may be ways to get at the former issue, but it is not the subject of this paper. The paper will examine whether there is a difference in the type of cases that are and are not settled.

The second issue that is only briefly explored in the literature is the issue of coalition formation in DS. Busch and Reinhardt (2002) note that the EU and the US intervene as third parties or co-complainants in most cases. We have very little information about the pattern of coalitions that form. The EU has been successful in mobilising a coalition against the US on steel, with some WTO members against whom it has acted in the past. It is not now difficult to identify who has intervened in a case,⁷ but it would be a major undertaking to identify on which side people enter.

⁶ Reinhardt has done very extensive work on the GATT era.

⁷ This is now systematically tabulated in the Overview Report. See note to Table 1.

THE DATA AND THE TERMINOLOGY

The basic data on disputes is taken from WTO (2003) and covers disputes up to 31 December 2002. We have taken each complainant as a separate dispute even where these are taken as single case; e.g., bananas against the EU (WS27) where each of the US, Guatemala, Mexico etc are taken as separate disputes. This results in us having 296 disputes rather than the 276 notified to the WTO at 31 December 2002.

We have aggregated the data into country groups corresponding to those used by Park and Umbricht (2001, page 215). We specify the Quad separately plus other developed countries (DC), newly industrialising countries (NICs), transition economies (TECs), traditional less developed countries (TLDCs) and least developed countries (LLDCs). Since there are no disputes involving LLDCs they do not appear in the summary tables and graphics but they are included when calculating trade shares etc.

Data on trade and incomes come from the World Bank (2001, 2002). Other data references are given at the appropriate points in the paper.

PRESENTATION OF THE FINDINGS

Who against Whom and When

This essentially descriptive section summarises the totality of cases between 1 January 1995 and 31 December 2002 and the pattern of cases over time. It examines complainant against respondent and the characteristics of cases over time. Finally it tries out some simple hypothesis about the pattern of cases.

Table 2 sets out a matrix of complainants against respondents over the whole period. What emerges strikingly from this table is the symmetry. There is no enormous imbalance between the incidence of complainant or respondent for each of the major groups. The US, the NICs and the TLDCs are very closely balanced. Canada is more often a complainant than a respondent by a ratio of 2 to 1, while the EU is a respondent in 20% more cases than it is a complainant. The TECs are respondents twice as much as they are complainants (but note the small number of cases).

Table 2 WTO Dispute Settlement System: All Cases 1995 – 2002
(Number of cases by country group)

| | Respondent | | | | | | | | |
|--------|------------|----|--------|-------|----|-----|-----|------|-------|
| | US | EU | Canada | Japan | DC | NIC | TEC | TLDC | Total |
| US | - | 28 | 4 | 6 | 4 | 18 | 2 | 11 | 73 |
| EU | 25 | - | 3 | 6 | 0 | 14 | 0 | 11 | 59 |
| Canada | 10 | 6 | - | 1 | 1 | 2 | 1 | 1 | 22 |
| Japan | 6 | 0 | 1 | - | 0 | 1 | 0 | 2 | 10 |
| DC | 5 | 2 | 1 | 0 | 1 | 1 | 3 | 3 | 16 |
| NIC | 19 | 12 | 3 | 0 | 0 | 4 | 2 | 15 | 55 |
| TEC | 0 | 0 | 0 | 0 | 0 | 1 | 5 | 1 | 7 |
| TLDC | 13 | 17 | 0 | 0 | 2 | 7 | 1 | 14 | 54 |
| Total | 78 | 65 | 12 | 13 | 8 | 48 | 14 | 58 | 296 |

Within groups some interesting trends emerge. The EU and the US are the biggest litigants over the period and are each other's most frequent adversaries (each accounting for about 40% of the other's complaints). The rest of the developed countries (including Canada and Japan) account for 18% of the cases brought by the US, while the NIC, TEC and TLDC account for the remaining 43% of cases. The equivalent figures for the EU are 16% and 41% respectively. The NICs take 60% of their cases against the US, the EU and Canada and almost 30% against TLDCs. The TLDCs take just short of 60% of cases against the US and the EU and a quarter against each other.

This pattern suggests that while the EU and the US are the biggest players it is not obvious that the NICs and TLDCs are shy of taking part or are obviously being bullied by the big players in particular.

It is important to recognise that these figures mask significant changes over time. Two trends are particularly evident. First, is the collapse in the number of new cases after 1997 (see Figure 1). This is largely due to the collapse in new cases by the EU and US (and to a lesser extent Canada and Japan), which in turn reflects a collapse in EU and US cases against each other (Figure 2).

Second, is the rise in the incidence of the US as a respondent just as the cases it brings are falling (Figure 3). None the less it is clear that up until end 2002 the balance of respondent over complainant is moving decisively in the direction of the US as a respondent. A point we will return to when we examine what the cases are about. The EU shows no such trend. Its role as Respondent and Complainant are falling broadly in tandem. The NICs and the TLDCs emerge as proportionately bigger users and bigger targets of the system in recent years, although in absolute terms the number of cases is more stable than for the developed countries.

Figure 1 Cases by Complainant 1995-2002

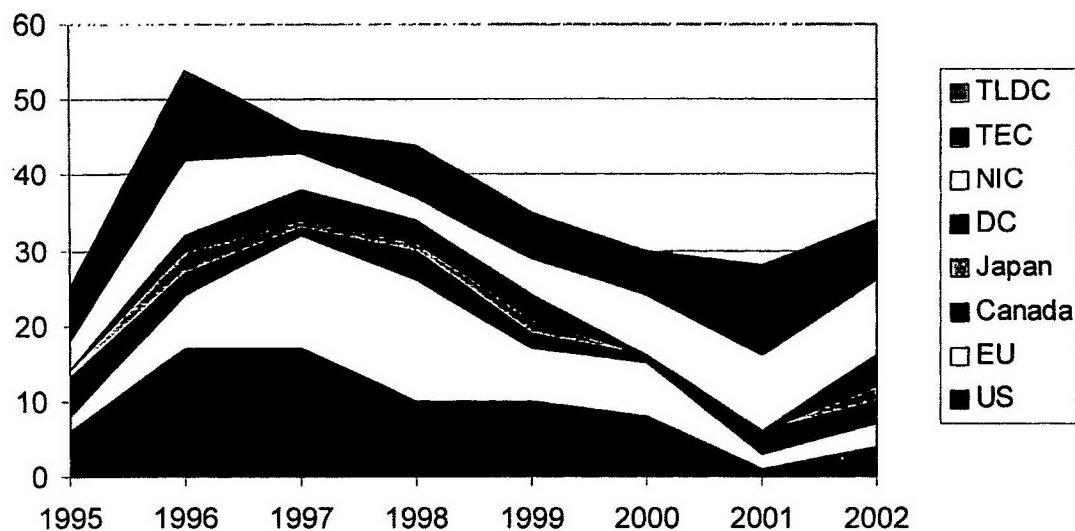


Figure 2 Cases between EU and US

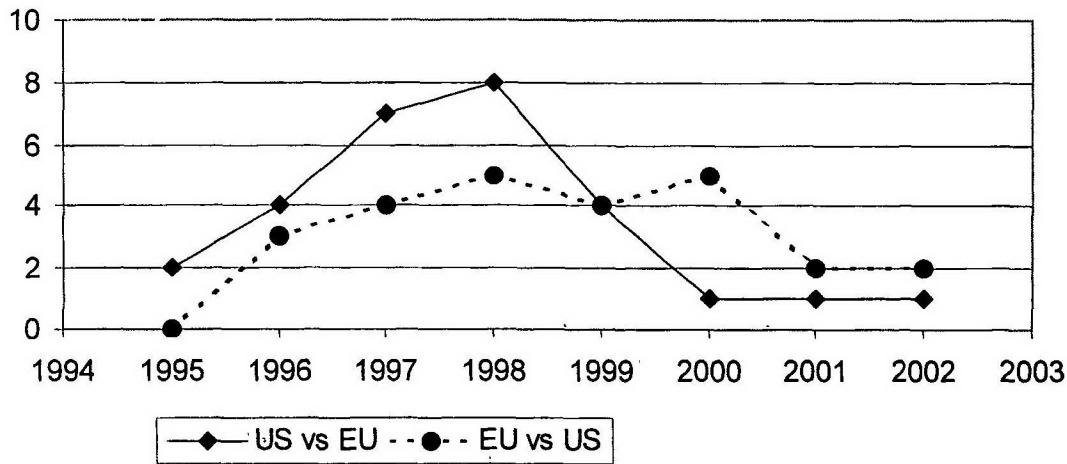
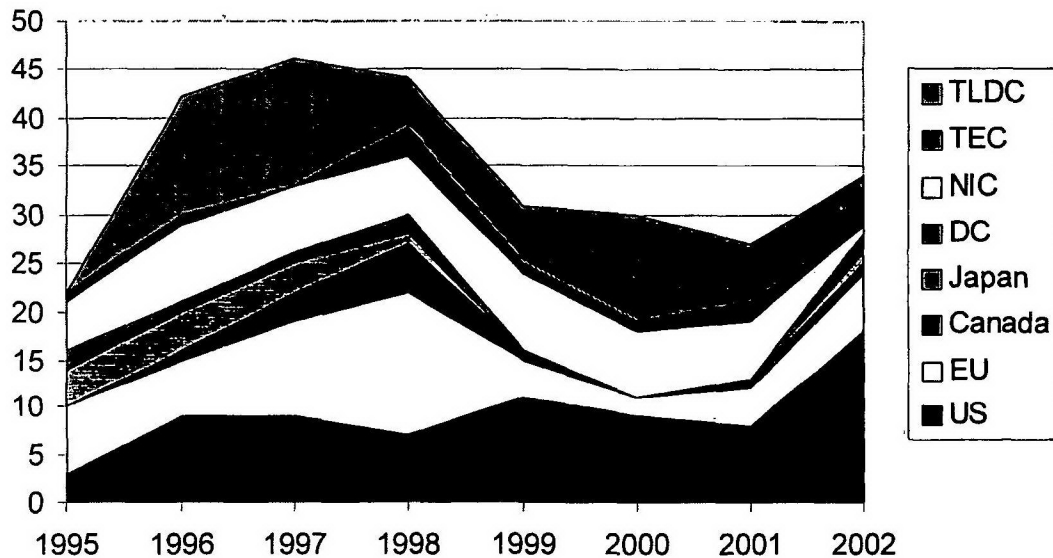


Figure 3 Cases by Respondent 1995-2002



Finally it may be worth noting from Figure 2 that at least in frequency terms the perceived tit for tat dispute pattern between the EU and the US has fallen away as the number of cases initiated against each other has fallen. Of course the cases that remain are still sensitive.

These trends may suggest that the perceived bias against developing countries in the early years of the dispute-settlement system may owe more to unfinished business from

the GATT dispute-settlement system between the US and various of its trading partners. EU tit for tat may also play a role (Figure 2).

Tables 3 and 4 which concentrate on the percentage distribution of cases by complainant and respondent underline these trends. The US peaked as a complainant in 1997 with 37% of all cases initiated and the EU peaked with 36% of all cases in 1998. Since then they have both fallen to below 10% of cases initiated by 2001 but are both around 10% in 2002.

Table 3 Complainants over time
(% of cases)

| | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 | Total | Trade share* |
|--------|------|------|------|------|------|------|------|------|-------|--------------|
| US | 24 | 31 | 37 | 23 | 29 | 27 | 4 | 12 | 26 | 18 |
| EU | 8 | 13 | 33 | 36 | 20 | 23 | 7 | 9 | 19 | 21 |
| Canada | 20 | 6 | 2 | 9 | 6 | 3 | 11 | 9 | 8 | 6 |
| Japan | 4 | 6 | 2 | 2 | 6 | 0 | 0 | 6 | 4 | 10 |
| DC | 0 | 4 | 9 | 7 | 9 | 0 | 0 | 12 | 5 | 5 |
| NIC | 16 | 19 | 11 | 7 | 14 | 27 | 36 | 29 | 18 | 22 |
| TEC | 0 | 0 | 0 | 7 | 3 | 0 | 7 | 3 | 3 | 3 |
| TLDC | 28 | 22 | 7 | 9 | 14 | 20 | 36 | 21 | 18 | 16 |

* share in 1998 merchandise trade of WTO membership (excl Intra-EU Trade)

Meanwhile, the US has gone from being a respondent in 10-20% of all complaints in the period 1995-98 to a plateau of 30% during 1999-2001, with a rise to 53% in 2002, largely due to the steel safeguard cases. The share of complaints against the EU on the other hand fell sharply after 1998.

Table 4 Respondents over Time
(% of cases)

| | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 | Total | Trade share* |
|--------|------|------|------|------|------|------|------|------|-------|--------------|
| US | 14 | 21 | 20 | 16 | 35 | 30 | 30 | 53 | 27 | 18 |
| EU | 32 | 14 | 22 | 34 | 13 | 7 | 15 | 18 | 20 | 21 |
| Canada | 0 | 2 | 7 | 11 | 3 | 0 | 4 | 3 | 4 | 6 |
| Japan | 18 | 10 | 7 | 2 | 0 | 0 | 0 | 3 | 5 | 10 |
| DC | 9 | 2 | 2 | 5 | 0 | 0 | 0 | 6 | 3 | 5 |
| NIC | 23 | 19 | 15 | 14 | 26 | 23 | 22 | 3 | 17 | 22 |
| TEC | 5 | 2 | 0 | 7 | 3 | 3 | 7 | 0 | 3 | 3 |
| TLDC | 0 | 29 | 28 | 11 | 19 | 37 | 22 | 15 | 21 | 16 |

* share in 1998 merchandise trade of the 2002 WTO membership (excl Intra-EU Trade)

Tables 3 and 4 also allow us for the first time to look at the very simple hypothesis that disputes will be proportionate to trade. This is not in reality a very different hypothesis from the basic one tested by Horn et al (1999) since the bigger trade is the more diverse it tends to be. We have used merchandise trade of WTO members (the universe for disputes) in 1998, the median year.

We explored a variety of regression approaches. Annex B reproduces some of the simpler results. We first of all explored the simplest hypothesis that total trade (or in this case the share of world trade) was the explanation of a country's propensity to be involved in WTO disputes. We found that for **both** complainants and respondents this variable explains over 80% of the variation in the number of cases by country. We considered a variety of other variables to see if they made a difference and found that they did not. Income per capita, for example, makes no significant difference to involvement in DS given the size of trade. That is to say a large poor country doing lots of trade is as likely to be a complainant or a respondent as a small rich one with the same trade value.

We also explored the question of whether different types of dispute had different determinants. Again we found that about 75% of the variation in the propensity to bring "trade defence" cases (i.e. challenges against anti-dumping CVD or safeguard decisions) was explained by trade volumes.

We did find a change over time in the determinants of disputes. During the early years of the WTO (1995-98) trade value alone explained 82% of the variance in willingness to bring disputes, but more recently (1999-2002) it only accounts for about 67%. This may be due to the dip in the share of disputes between the EU and the US (see Figure 2) and an increase in the number brought by NICs and traditional developing countries.

Overall this section suggests that the simple hypothesis that disputes will be proportionate to trade shares is at least tenable. Regression analysis done by adding other potentially significant variables such as income per head or measures of openness added nothing to the explanatory power of our estimates.

It must, of course, be recognised that the high correlations between disputes and trade shares is dominated by the data on the EU and the US. However we argue that this is not a "distortion" since they do indeed account for so many of the cases and it would be nonsense to exclude them. These data essentially confirm what the tables tell us, namely that the high share of the EU and US in disputes is roughly commensurate with their trade share.

There does not seem therefore to be any strong evidence of significant bias as between small and large countries or between richer and poorer countries at least as far as participation in the system as between roles as complainants or respondents. If anything the evidence may be consistent with richer countries being less present than trade shares would suggest, which may be attributable to Japan's lack of presence within the DS system and to the increasing use of the system by NICs and TLDCs.

Who and What Issues

On the question about what issues disputes are taken on we have made a highly simplifying assumption. We have decided against either a sectoral or an Agreement-by-Agreement Article-by-Article approach. Not least because many, if not most, cases are taken on multiple criteria and the overlaps leading to single cases scoring more than once. Instead we have taken two main categories. First, cases dealing with issue of domestic regulation which we have labelled 'Within Border'. These encompass the new agreements in the Uruguay Round -- i.e. Trade Related Intellectual Property Rights (TRIPS), Trade-Related Investment Measures (TRIMs), Sanitary and Phytosanitary (SPS), Technical Barriers to Trade (TBT), and the General Agreement on Trade in Services (GATS) -- as

well as GATT Article 3 (national treatment). The second category we have taken is Trade Defence which covers anti-dumping, countervailing measures and safeguards. These two categories cover 75% of all cases.

'Within Border' Cases

Tables 5 and 6 show the trends in cases dealing with 'within border' issues. These represent 44% of all cases in all categories initiated since 1995. The US has been the most frequent complainant in this category (16% of all cases over the period 1995-2002) and the EU the most frequent respondent followed by the TLDCs and NICs (see Table 5).

Table 5 Disputes on Within Border Issues: Who v. whom, 1995-2002

| | <i>Respondent</i> | | | | | | | | <i>Total cases</i> | <i>% of cases</i> |
|--------------------|-------------------|-----------|---------------|--------------|-----------|------------|------------|-------------|--------------------|-------------------|
| | <i>US</i> | <i>EU</i> | <i>Canada</i> | <i>Japan</i> | <i>DC</i> | <i>NIC</i> | <i>TEC</i> | <i>TLDC</i> | | |
| <i>Complainant</i> | | | | | | | | | | |
| US | - | 14 | 3 | 6 | 1 | 13 | 0 | 9 | 46 | 16 |
| EU | 10 | - | 3 | 3 | 0 | 4 | 0 | 6 | 26 | 9 |
| Canada | 1 | 5 | - | 1 | 1 | 1 | 0 | 0 | 9 | 3 |
| Japan | 0 | 0 | 1 | - | 0 | 1 | 0 | 2 | 4 | 1 |
| DC | 0 | 1 | 0 | 0 | 0 | 1 | 1 | 0 | 3 | 1 |
| NIC | 4 | 4 | 0 | 0 | 0 | 0 | 0 | 1 | 9 | 3 |
| TEC | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 1 | 2 | 1 |
| TLDC | 2 | 12 | 0 | 0 | 2 | 2 | 0 | 4 | 22 | 7 |
| total cases | 17 | 36 | 7 | 10 | 4 | 22 | 2 | 23 | 121 | 41 |
| % of cases | 6 | 12 | 2 | 3 | 1 | 7 | 1 | 8 | 41 | |

The total number of 'within border' cases initiated in any year peaked in 1996 at 28. As a share of annual cases within border cases peaked at 72% in 1995 and has fallen in both absolute and percentage terms since then (see Table 6). Overall the fall in 'within border' cases from a peak of 28 in 1996 to only 7 in 2001 explains two thirds of the overall fall in cases in that period. It also maps the fall in cases initiated by the US. The close association with the US as a complainant in part reflects the TRIPs cases that the US undertook against developing countries, the Beef Hormones case under the SPS Agreement and the distribution aspects of the bananas cases. Shrimp/turtle and reformulated gasoline also contribute to the US appearances as a respondent. Once more there is an element of unfinished business from the GATT era in this, which might suggest that over time these regulatory issues may be less present in the dispute-settlement system than experience to date.

Table 6 Disputes on Within Border Issues by Complainant over Time

| <i>Complainants</i> | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 | Total |
|-----------------------------|------|------|------|------|------|------|------|------|-------|
| US | 5 | 14 | 10 | 3 | 6 | 6 | 0 | 3 | 47 |
| EU | 2 | 4 | 8 | 8 | 3 | 1 | 0 | 0 | 26 |
| Canada | 4 | 1 | 0 | 4 | 0 | 0 | 0 | 0 | 9 |
| Japan | 0 | 3 | 0 | 1 | 1 | 0 | 0 | 0 | 5 |
| DC | 0 | 0 | 1 | 1 | 1 | 0 | 0 | 1 | 4 |
| NIC | 2 | 2 | 0 | 1 | 1 | 1 | 1 | 4 | 12 |
| TEC | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 1 | 2 |
| TLDC | 5 | 4 | 0 | 1 | 4 | 1 | 5 | 6 | 26 |
| Total | 18 | 28 | 19 | 19 | 16 | 9 | 7 | 15 | 131 |
| % of all cases in each year | 72 | 52 | 41 | 43 | 46 | 30 | 25 | 44 | 44 |

Trade Defence Cases

Tables 7 and 8 show the same data for the cases based on trade defence instruments. These represent 31% of all cases undertaken since 1995. The principal complainants are TLDCs and NICs, with the US and the NICs and TLDCs as the main respondents (see Table 7).

Table 7 Disputes on Trade Defence Issues: Who v. Whom, 1995-2002

| | Respondent | | | | | | | | | % of cases |
|------------|------------|----|--------|-------|----|-----|-----|------|-------|------------|
| | US | EU | Canada | Japan | DC | NIC | TEC | TLDC | Total | |
| US | | 9 | 0 | 0 | 1 | 3 | 0 | 0 | 13 | 4 |
| EU | 10 | | 0 | 0 | 0 | 5 | 0 | 0 | 15 | 5 |
| Canada | 7 | 0 | | 0 | 0 | 0 | 0 | 0 | 7 | 2 |
| Japan | 4 | 0 | 0 | | 0 | 0 | 0 | 0 | 4 | 1 |
| DC | 5 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 6 | 2 |
| NIC | 12 | 1 | 1 | 0 | 0 | 2 | 0 | 10 | 26 | 9 |
| TEC | 0 | 0 | 0 | 0 | 0 | 1 | 2 | 0 | 3 | 1 |
| TLDC | 4 | 2 | 0 | 0 | 0 | 3 | 0 | 7 | 16 | 5 |
| Total | 42 | 12 | 1 | 0 | 2 | 14 | 2 | 17 | 90 | 30 |
| % of cases | 14 | 4 | 0 | 0 | 1 | 5 | 1 | 6 | 30 | |

Over time the share of Trade Defence cases in the annual number of cases initiated has grown from 1 in 1995 to 20 in 2002. Proportionately these cases have grown from 4% of all cases in 1995 to a peak of 68% in 2001 and 59% in 2002 (see Table 8). This increase in trade defence instrument cases explains what sustains the number of NICs and TLDCs cases in the system and, hence, their increased importance in the system as the total number of cases initiated each year has fallen. It also largely explains the growth of the US as a Respondent.

Table 8 Trade Defence Cases by Complainant over time

| <i>Complainant</i> | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 | <i>Total</i> |
|-----------------------------|------|------|------|------|------|------|------|------|--------------|
| US | 0 | 1 | 1 | 6 | 3 | 0 | 1 | 1 | 13 |
| EU | 0 | 1 | 1 | 2 | 2 | 4 | 2 | 3 | 15 |
| Canada | 0 | 0 | 0 | 0 | 0 | 1 | 3 | 3 | 7 |
| Japan | 0 | 0 | 0 | 0 | 2 | 0 | 0 | 2 | 4 |
| DC | 0 | 0 | 0 | 1 | 2 | 0 | 0 | 3 | 6 |
| NIC | 0 | 3 | 2 | 0 | 3 | 5 | 8 | 5 | 26 |
| TEC | 0 | 0 | 0 | 1 | 1 | 0 | 1 | 0 | 3 |
| TLDC | 1 | 1 | 2 | 2 | 2 | 3 | 4 | 1 | 16 |
| Total cases | 1 | 6 | 6 | 12 | 15 | 13 | 19 | 18 | 90 |
| % of all cases in each year | 4 | 11 | 13 | 27 | 43 | 43 | 68 | 53 | 30 |

The increase in the number of trade defence cases also maps the increase in anti-dumping cases and in countries using anti dumping in the period since 1995 (Kempton et al 1999, Stevenson, 2001)

WHICH CASES HAVE COMPLETED?

Before turning to who wins and who loses it is worth pausing on the question of whether there is any bias in the pattern of cases that have completed. It might be that poorer countries are not able to resource the process to the degree that richer countries might and that hampers their ability to put all considerations before a panel which in turn leads to a more rapid throughput of cases where they are respondents and a lag where they are complainants.

Table 9 Cases Completed, Cases Initiated and Trade Share

| | % of cases completed when... | | % cases begun as | | Trade share |
|--|------------------------------|------------|-----------------------|------------|-------------|
| | Complainant | Respondent | Complainant | Respondent | |
| US | 23 | 31 | 25 | 27 | 18 |
| EU | 26 | 11 | 20 | 20 | 21 |
| Canada | 10 | 10 | 7 | 4 | 6 |
| Japan | 5 | 5 | 3 | 5 | 10 |
| DC | 4 | 2 | 5 | 3 | 5 |
| NIC | 15 | 15 | 19 | 17 | 22 |
| TEC | 1 | 0 | 2 | 3 | 3 |
| TLDC | 16 | 17 | 18 | 21 | 16 |
| correlation coefficient with trade share | 0.87 | 0.69 | | | |
| correlation coefficient with cases begun | 0.94 | 0.89 | | | |

Table 9 suggests that as far as complainants are concerned there is not much difference between cases completed and cases started with high correlation coefficients (albeit on a small number of observations). There is some small sign that NICs, TECs and TLDCs are

completing at a slower rate as both complainants and respondents compared with the number of cases that they initiate. But this may result from the larger number of cases started by the US in the early part of the process rather than any bias. Further, their completion shares are lower than their initiation shares when they are respondents, where the bias might be expected in the other direction.

WHO WINS: WHO LOSES

As noted in the literature survey above, who wins is a more complex question than it looks and a true answer would require a degree of legal analysis that the authors cannot provide. Further, the question is inevitably bound up with whether the respondent complies and even if it does comply, whether it does so in a way that leaves the barrier effectively in place.

We have taken a simple approach in which a case where the complainant wins on at least one of the issues it raises is scored for the complainant. This leads to a rather straightforward conclusion that complainants win in 88% of cases that reach a final conclusion in a panel or before the Appellate Body.

Table 10 Who won against whom
(% of completed cases)

| | Respondent | | | | | | | |
|-------------|------------|------|--------|-------|------|------|-----|------|
| | US | EU | Canada | Japan | DC | NIC | TEC | TLDC |
| Complainant | | | | | | | | |
| US | | 40% | 100% | 67% | 100% | 80% | | 100% |
| EU | 91% | | 100% | 100% | | 100% | | 100% |
| Canada | 50% | 50% | | 100% | 100% | 100% | | 67% |
| Japan | 100% | | 100% | | | | | 100% |
| DC | 100% | | 100% | | | 100% | | 100% |
| NIC | 100% | 100% | 100% | | | | | 67% |
| TEC | | | | | | 100% | | 100% |
| TLDC | 100% | 100% | | | | 0% | | 100% |
| Total | 91% | 71% | 100% | 80% | 100% | 86% | | 94% |

Note: blank cells denote where there are no cases completed. A zero denotes where the complainant has lost all cases against a particular respondent.

Table 10 suggests that Canada and the US have lost a higher share of the complaints that they brought than the average. Because of the greater losses by these rich countries this table gives some support to the proposition that poorer and perhaps smaller countries do better in the dispute settlement game. It may also reflect the possibility that richer countries can afford to take on more speculative cases to placate domestic lobbies. The figures in any individual cell should be treated with care since they represent a small number of cases. For example, the poor hit rate of the US against the EU is based on only 5 cases which have reached completion. The three lost cases were on the classification of computer equipment against the EU and the UK and Ireland separately. Each thus counts as separate cases against the EU even though it was the same case in substance.

Table 11 Cases Won by Complainant over time
(% of completed cases)

| | | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | Total |
|-------------|--------|------|------|------|------|------|------|------|-------|
| Complainant | US | 100% | 75% | 67% | 100% | 75% | | | 76% |
| | EU | 100% | 100% | 100% | 86% | 100% | 100% | 100% | 96% |
| | Canada | 100% | 100% | | 0% | | 0% | 67% | 67% |
| | Japan | | 100% | | 100% | 100% | | | 100% |
| | DC | | | | 100% | 100% | | | 100% |
| | NIC | 100% | 75% | 100% | | 100% | 100% | 100% | 93% |
| | TEC | | | | 100% | | | | 100% |
| | TLDC | 50% | 100% | | 100% | | 100% | 100% | 93% |
| Total | | 86% | 88% | 87% | 86% | 94% | 89% | 86% | 88% |

Note: blank cells denote where there are no cases completed. A zero denotes where the complainant has lost all cases in a particular year.

There is no discernible trend in wins over time from Table 11, although Table 12 suggests that 'within border' cases are slightly more likely to be won than the average.

Table 12 Completed Cases Won by Complainant by Issue, 1995-2002
(percent)

| | | Within Border | Trade Defence | Other | Total |
|-------------|--------|---------------|---------------|-------|-------|
| Complainant | US | 92% | 100% | 43% | 76% |
| | EU | 93% | 100% | 100% | 96% |
| | Canada | 75% | 50% | 100% | 67% |
| | Japan | 100% | 100% | | 100% |
| | DC | 100% | 100% | 100% | 100% |
| | NIC | 100% | 88% | 100% | 93% |
| | TEC | | 100% | | 100% |
| | TLDC | 100% | 75% | 100% | 93% |
| Total | | 93% | 87% | 81% | 88% |

STATUS OF CASES

In this section we examine whether there is any distinctive difference between cases that are settled by a panel or the Appellate Body (Panel), mutually agreed settlements (MAS) and cases pending consultation after a year (PC after 1 year). This last category is an attempt to get to those cases that, while officially still open, do not appear to be being pursued. Indeed some may be settled and the WTO secretariat not informed. Tables 13 and 15 examine the distribution of cases in each category by class of Complainant and Respondent respectively.

Table 13 Case status by Complainant
(% distribution compared with all cases initiated)

| | US | EU | Canada | Japan | DC | NIC | TEC | TLDC | Total |
|-----------------|-----|-----|--------|-------|-----|-----|-----|------|-------|
| All | 25% | 20% | 7% | 3% | 5% | 19% | 2% | 18% | 296 |
| Panel | 22% | 22% | 9% | 6% | 6% | 16% | 1% | 16% | 116 |
| MAS | 43% | 14% | 8% | 2% | 14% | 8% | 2% | 8% | 49 |
| PC after 1 year | 23% | 20% | 6% | 1% | 1% | 22% | 3% | 24% | 93 |

The correlation coefficients at Table 14 suggest that the cases still pending after 12 months show a similar geographical pattern both to all cases in the system and to those which have completed panel and Appellate Body processes with correlation coefficients above 0.95.

Table 14 Correlation coefficients for geographical distribution and case status, by Complainant

| | All | Panel | MAS | PC after 1 year |
|-----------------|-------|-------|-------|-----------------|
| All | 1 | | | |
| Panel | 0.969 | 1 | | |
| MAS | 0.675 | 0.643 | 1 | |
| PC after 1 year | 0.961 | 0.906 | 0.478 | 1 |

The cases pending show no outstanding geographical bias. The cases settled by mutual agreement, however, show a real divergence from other categories, with the US and other developed countries initiating 57% of them and the NICs and TLDCs only initiating 16%. These results are consistent with Busch and Reinhardt's (2002) finding that pairs of democracies are more likely to reach negotiated settlements, but are too aggregated to confirm the persistence of the trend in earlier cases.

Table 15 Case status by Respondent
(% distribution compared with all cases initiated)

| | US | EU | Canada | Japan | DC | NIC | TEC | TLDC | Total |
|-----------------|-----|-----|--------|-------|----|-----|-----|------|-------|
| All | 27% | 20% | 4% | 5% | 3% | 17% | 3% | 21% | 276 |
| Panel | 40% | 11% | 8% | 6% | 2% | 17% | 0% | 17% | 108 |
| MAS | 9% | 27% | 0% | 9% | 7% | 16% | 9% | 23% | 44 |
| PC after 1 year | 19% | 26% | 2% | 3% | 0% | 22% | 5% | 23% | 86 |

The respondent distribution shows less correlation between all cases, completed panels and those pending for a year than for the cases by Complainant. Correlation coefficients drop to around 0.6 for pending cases against panel settlements and just over 0.9 when compared with all cases.

Table 16 Correlation coefficients for geographical distribution and case status, by Respondent

| | All | Panel | MAS | PC after 1 year |
|-----------------|-------|-------|-------|-----------------|
| All | 1 | | | |
| Panel | 0.867 | 1 | | |
| MAS | 0.618 | 0.155 | 1 | |
| PC after 1 year | 0.906 | 0.595 | 0.845 | 1 |

Once more it is the mutually agreed settlement cases that stand out. In particular the TECs are respondents in 9% of settled cases, but in only 3% of complaints generally. By contrast, the US when it is a respondent accounts for only 9% of the settlements, while the EU for 27%. The NICs and TLDCs as respondents are involved in the broadly same proportion of settled cases as complaints generally.

This might be where we see hints of the exercise of power. A reasonable expectation would be that more powerful countries would seek a negotiated settlement where power is

more important. Conversely, weaker countries would be expected to prefer the legal process to run its course. Our data is consistent with these expectations. Developed countries are complainants in 60% of complaints, but 81% of settled cases (Table 13). When NICs and TLDCs are complainants they are much more likely to proceed to panel than to reach a negotiated settlement. There is, however, a lot of static in this data. There is particularly wide variation among the developed countries with regard to the share of complaints they bring that they settle. Further, these findings may be distorted by the types of issues brought by who against whom, as the likelihood of settlement varies widely depending on the type of issue at stake (see Table 17).

Examining case status in conjunction with type of issue (Table 17) suggests once more that the types of cases pending for more than a year are very similar to all cases and quite similar to cases adjudicated in panels or before the Appellate Body. Once again it is the mutually agreed settlements which show a very different pattern to either cases pending for more than a year or those settled. Only 9% of MAS cases involve trade defence cases compared with 34% of cases pending for a year and 45% of cases settled by a panel. By contrast 'within border' cases constitute 66% of the MAS cases compared with 40% of panel cases and 38% of pending cases.

Table 17 Case status distributed by issue

| | | <i>Type of issue</i> | | | <i>Total</i> |
|--------------------|-----------------|----------------------|----------------------|--------------|--------------|
| | | <i>Within border</i> | <i>Trade defence</i> | <i>Other</i> | |
| <i>Case status</i> | All | 40% | 32% | 28% | 276 |
| | Panel | 39% | 43% | 19% | 108 |
| | MAS | 66% | 9% | 25% | 44 |
| | PC after 1 year | 33% | 34% | 34% | 86 |

The preponderance of 'within border' cases and lack of trade defence cases among the MAS may reflect no more than the importance of the US and the concomitant lack of importance of NICs and TLDCs as complainants in this category. The causality might equally run the other way, however. The US government's low willingness to settle complaints brought against it might be due to the high preponderance of trade defence cases against it.

There are a couple of factors possibly at work here: one legal, the other political. The absence of trade defence cases settled 'out of court' may reflect greater confidence by complainants that they will win in front of a panel and that they are more likely to get their way out of court on the 'within borders' cases. At the same time, the domestic political pay-off structures of the two types of disputes are very different for the respondent country. 'Within border' measures often have broader political significance than do trade defence instruments. In addition, they are normally intended to serve some public policy objective and the negative impact on trade is a side-effect. Thus, there may be a stronger incentive for respondents to reach a compromise that minimises the domestic policy changes necessary to resolve the dispute. As the purpose of trade defence measures is protectionism, respondents may gain domestic political advantage by holding out as long as possible and no political benefit from compromising early. A case-by-case examination would be required to begin to address these issues adequately.

Conclusions

Our headline findings are:

- a country's trade share is a pretty robust indicator of its likelihood to be either a complainant or a respondent; thus the frequently remarked on absence of the least developed countries from the dispute-settlement system can be explained by their low volume of trade;
- there is not much, if any, evidence of a bias against developing countries either as complainants or respondents (Tables 3 and 4);
- regulatory issues are fading as reasons for disputes and that trade defence disputes are the rising issue (Tables 5–8);
- Complainants overwhelmingly win (88% of cases (Table 10)
- There is no strong evidence that the rate of completion of cases is biased against NICs or TLDCs (Table 9);
- Cases that are settled by mutual agreement have a very different profile from other categories of settled cases, both geographically and by issue (Tables 14 and 17). This may be evidence of some use of political/economic weight to persuade Respondents to settle 'out of court.' On the other hand there is not much difference in the country distribution of cases that have still not reached a panel after 12 months and those that go to panels (and beyond) (Tables 12 and 13

This analysis suggests that the slug of cases that were instituted by the US (and tit for tat by the EU) in the 1995-1998 period biased perceptions of the system both in terms of 'bias' against LDCs and in terms of the focus on 'within border' measures. The more recent surge in trade defence cases has brought the NICs and LDCs more clearly into the picture, especially proportionately as the EU/US cases have fallen.

The weight of cases involving 'within border' measures particularly during 1995-96 (when they accounted for 60% of all complaints brought) strongly suggests that the Uruguay Round and the dispute settlement system in particular served to resolve some of the unsettled business of the GATT. This is especially true with regard to TRIPs and SPS and on environment and taxation. Strikingly, but not surprisingly, complaints under the GATS are few and far between. The bottom-up and generally conservative nature of the agreement may mean that few measures fall foul of commitments made.

The absolute decline in the number of complaints concerning 'within –border' measures warrants some further attention. Part of the answer, as alluded to above, may be that some parties succeeded in incorporating in the Uruguay Round agreements rules that addressed specific existing barriers. There is some evidence that the US government, for example, very much had the EU's banana trade regime and ban on hormone-treated beef in its sights when it was negotiating the GATS and SPS agreements. Another part of the answer might be that the DSB has issued a number of rulings -- asbestos, shrimp-turtle, and beef hormones -- that have interpreted various agreements in such a way as to emphasise the legitimate scope for governments to adopt non-discriminatory, but trade-impeding regulations. The high proportion of complainant victories may suggest that complainants consider very carefully the likelihood of success before bringing a complaint. Another possible explanation, facilitated by DSB interpretations of the rules, is that governments have got better at making their rules compatible with existing multilateral commitments.

Thus two learning processes may be at work, one by potential complainants about the prospects of successful resolution (not just winning the case, over a quarter of cases completed by Panel or Appellate Body judgement have been engaged in subsequent adjudication/arbitration on compliance - Table 1). The other by governments generally getting used to the rules and learning to play the game better in terms of keeping their regulations within permissible bounds. Whatever the reason, the more recent trend in WTO cases suggests a return to the more familiar GATT-type border measures environment.

This is potentially relevant to concerns about the legitimacy of the WTO. Much of the public concern about the power of the WTO concerns 'within border' cases, especially those involving SPS and TRIPs. Arguably two different considerations have been at work. One involved the delegation, with insufficient political oversight, to a non-democratic international organisation the power to interpret fairly general rules and principles, for example with regard to SPS and the application of national treatment. The other was the adoption and enforcement of fairly precise rules that closely reflect the preferences of the dominant player(s) in the system, e.g., TRIPs. Irrespective of whether either of these perceptions is correct, the shift away from such cases towards less broadly contentious issues within more familiar rules, may take some of the heat out of the question of the legitimacy of the WTO.

A related issue is how the experience and process of dispute settlement is shaping the current negotiations. The experience with TRIPs cases, for example, has generated pressure for reform. This is most evident in the 'Declaration on the TRIPs Agreement and Public Health'.⁸ The surge in trade defence cases over the past few years underlines the pressure for reform of the anti-dumping provisions.

Overall the Dispute Settlement system seems to be settling down, with a lower than expected number of cases in recent years,⁹ and moving back towards more traditional border measures. This may reflect that the DS system has addressed some of the weaknesses of the GATT, with some long-standing irritations now addressed. The issues that have been important in the DS system also feature in the Doha Agenda notably TRIPs and anti-dumping, which may point to its role as an indicator of a potential need for revision to the rules.

Our findings are of course a snapshot or perhaps two snapshots of the periods 1995-98 and 1999-2002. The change in the composition of cases with the increase in 'trade defence' cases brought by middle income countries may or may not be a trend. It is of course unclear whether more involvement in the system by poorer countries is a good or a bad thing. We may regret if they become more litigious or if indeed they are subject to more trade barriers. One may also wonder whether bursts of litigation do in fact have the effect of resolving a problem. The persistent series of findings against the US on trade defence might indicate that they are systematically declining to modify rules or practices that have been routinely condemned by the DSB. In an ideal world we would hope that the result will be a peak followed by a compliance response.

⁸ WT/MIN901/DEC/W/2, 14 November 2001.

⁹ The number of cases brought each year since 1999 has been significantly below the dispute trend predicted by Busch and Reinhardt (2002).

What would a new round bring? One would hope that it would lead to fewer disputes if the Contracting Parties can be persuaded to tidy up the ambiguities of the rules that provoke some of the disputes. The prevalence of anti-dumping disputes of course raises the question of whether the EU and the US will be forced to accept the codification of the Appellate Body's interpretation of the rules, or whether they will seek to tie the rules down to what they thought they had agreed in the Uruguay Round. The most regrettable outcome would of course be if a new round introduced further disciplines and/or ambiguities into the system which had to be resolved anew by the DSB.

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Annex A

Table 1 Complainants by Respondents 1995 - 2002

| | | Year | | | | | | | | total |
|-------------|------------|------|------|------|------|------|------|------|------|-------|
| Complainant | Respondent | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 | |
| US | EU | 2 | 4 | 7 | 8 | 4 | 1 | 1 | 1 | 28 |
| | Canada | | 1 | 1 | | 1 | | | 1 | 4 |
| | Japan | 1 | 3 | 1 | | | | | 1 | 6 |
| | DC | 1 | 1 | 1 | 1 | | | | | 4 |
| | NIC | 2 | 3 | 3 | 1 | 4 | 5 | | | 18 |
| | TEC | | 1 | | | | 1 | | | 2 |
| | TLDC | | 4 | 4 | | 1 | 1 | | 1 | 11 |
| | All | 6 | 17 | 17 | 10 | 10 | 8 | 1 | 4 | |
| EU | US | 0 | 3 | 4 | 5 | 4 | 5 | 2 | 2 | 25 |
| | EU | | | | | | | | | 0 |
| | Canada | | | | 3 | | | | | 3 |
| | Japan | 2 | 1 | 2 | 1 | | | | | 6 |
| | DC | | | | | | | | | 0 |
| | NIC | | 2 | 4 | 3 | 3 | 1 | | 1 | 14 |
| | TEC | | | | | | | | | 0 |
| | TLDC | | 1 | 5 | 4 | | 1 | | | 11 |
| | All | 2 | 7 | 15 | 16 | 7 | 7 | 2 | 3 | |
| Canada | US | | | | 1 | 2 | 1 | 3 | 3 | 10 |
| | EU | 2 | 1 | | 3 | | | | | 6 |
| | Canada | | | | | | | | | 0 |
| | Japan | 1 | | | | | | | | 1 |
| | DC | 1 | | | | | | | | 1 |
| | NIC | 1 | 1 | | | | | | | 2 |
| | TEC | | 1 | | | | | | | 1 |
| | TLDC | | | 1 | | | | | | 1 |
| | All | 5 | 3 | 1 | 4 | 2 | 1 | 3 | 3 | |
| Japan | US | 1 | | 1 | | 2 | | | 2 | 6 |
| | EU | | | | | | | | | 0 |
| | Canada | | | | 1 | | | | | 1 |
| | Japan | | | | | | | | | 0 |
| | DC | | | | | | | | | 0 |
| | NIC | | 1 | | | | | | | 1 |
| | TEC | | | | | | | | | 0 |
| | TLDC | | 2 | | | | | | | 2 |
| | All | 1 | 3 | 1 | 1 | 2 | 0 | 0 | 2 | |
| DC | US | | | | | 2 | | | 3 | 5 |
| | EU | | | 1 | | | | | 1 | 2 |
| | Canada | | | | 1 | | | | | 1 |
| | Japan | | | | | | | | | 0 |
| | DC | | | | 1 | | | | | 1 |
| | NIC | | | | | 1 | | | | 1 |
| | TEC | | 2 | | 1 | | | | | 3 |
| | TLDC | | | 3 | | | | | | 3 |
| | All | 0 | 2 | 4 | 3 | 3 | 0 | 0 | 4 | |

| | | | | | | | | | | |
|-------|--------|----|----|----|----|----|----|----|----|----|
| NIC | US | 1 | 3 | 2 | 1 | 1 | 1 | 4 | 6 | 19 |
| | EU | 2 | 1 | 1 | 1 | 1 | 1 | 2 | 3 | 12 |
| | Canada | | | 2 | | | | 1 | | 3 |
| | Japan | | | | | | | | | 0 |
| | DC | | | | | | | | | 0 |
| | NIC | 1 | | | | | 1 | 2 | | 4 |
| | TEC | | 2 | | | | | | | 2 |
| | TLDC | | 4 | | 1 | 3 | 5 | 1 | 1 | 15 |
| | All | 4 | 10 | 5 | 3 | 5 | 8 | 10 | 10 | |
| TEC | US | | | | | | | | | 0 |
| | EU | | | | | | | | | 0 |
| | Canada | | | | | | | | | 0 |
| | Japan | | | | | | | | | 0 |
| | DC | | | | | | | | | 0 |
| | NIC | | | | 1 | | | | | 1 |
| | TEC | | | | 2 | 1 | | 2 | | 5 |
| | TLDC | | | | | | | | 1 | 1 |
| | All | 0 | 0 | 0 | 3 | 1 | 0 | 2 | 1 | |
| TLDC | US | 1 | 6 | 2 | | | 2 | | 2 | 13 |
| | EU | 4 | 4 | 1 | 3 | 3 | | 1 | 1 | 17 |
| | Canada | | | | | | | | | 0 |
| | Japan | | | | | | | | | 0 |
| | DC | | | | | | | | 2 | 2 |
| | NIC | 1 | 1 | | 1 | | | 4 | | 7 |
| | TEC | 1 | | | | | | | | 1 |
| | TLDC | | 1 | | | 2 | 4 | 5 | 2 | 14 |
| | All | 7 | 12 | 3 | 4 | 5 | 6 | 10 | 7 | |
| Total | | 25 | 54 | 46 | 44 | 35 | 30 | 28 | 34 | |

Annex

Table 2 Respondents by Complainants 1995 - 2002

| <i>Respondent</i> | <i>Complainant</i> | <i>Year</i> | | | | | | | | <i>Total</i> |
|-------------------|--------------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|--------------|
| | | <i>1995</i> | <i>1996</i> | <i>1997</i> | <i>1998</i> | <i>1999</i> | <i>2000</i> | <i>2001</i> | <i>2002</i> | |
| US | EU | | 3 | 4 | 5 | 4 | 5 | 2 | 2 | 25 |
| | Canada | | | | 1 | 2 | 1 | 3 | 3 | 10 |
| | Japan | 1 | | 1 | | 2 | | | 2 | 6 |
| | DC | | | | | 2 | | | 3 | 5 |
| | NIC | 1 | 3 | 2 | 1 | 1 | 1 | 4 | 6 | 19 |
| | TEC | | | | | | | | | 0 |
| | TLDC | 1 | 6 | 2 | | | 2 | | 2 | 13 |
| | <i>total</i> | 3 | 12 | 9 | 7 | 11 | 9 | 9 | 18 | |
| EU | US | 2 | 4 | 7 | 8 | 4 | 1 | 1 | 1 | 28 |
| | Canada | 2 | 1 | | 3 | | | | | 6 |
| | Japan | | | | | | | | | 0 |
| | DC | | | 1 | | | | | 1 | 2 |
| | NIC | 2 | 1 | 1 | 1 | 1 | 1 | 2 | 3 | 12 |
| | TEC | | | | | | | | | 0 |
| | TLDC | 4 | 4 | 1 | 3 | 3 | | 1 | 1 | 17 |
| | <i>total</i> | 10 | 10 | 10 | 15 | 8 | 2 | 4 | 6 | |
| Canada | US | | 1 | 1 | | 1 | | | 1 | 4 |
| | EU | | | | 3 | | | | | 3 |
| | Japan | | | | 1 | | | | | 1 |
| | DC | | | | 1 | | | | | 1 |
| | NIC | | | 2 | | | | 1 | | 3 |
| | TEC | | | | | | | | | 0 |
| | TLDC | | | | | | | | | 0 |
| | <i>total</i> | 0 | 1 | 3 | 5 | 1 | 0 | 1 | 1 | |
| Japan | US | 1 | 3 | 1 | | | | | 1 | 6 |
| | EU | 2 | 1 | 2 | 1 | | | | | 6 |
| | Canada | 1 | | | | | | | | 1 |
| | DC | | | | | | | | | 0 |
| | NIC | | | | | | | | | 0 |
| | TEC | | | | | | | | | 0 |
| | TLDC | | | | | | | | | 0 |
| | <i>total</i> | 4 | 4 | 3 | 1 | 0 | 0 | 0 | 1 | |
| DC | US | 1 | 1 | 1 | 1 | | | | | 4 |
| | EU | | | | | | | | | 0 |
| | Canada | 1 | | | | | | | | 1 |
| | Japan | | | | | | | | | 0 |
| | DC | | | | 1 | | | | | 1 |
| | NIC | | | | | | | | | 0 |
| | TEC | | | | | | | | | 0 |
| | TLDC | | | | | | | | 2 | 2 |
| | <i>total</i> | 2 | 1 | 1 | 2 | 0 | 0 | 0 | 2 | |

| <i>Respondent Complainant</i> | | <i>Year</i> | | | | | | | | <i>Total</i> |
|-------------------------------|--------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|--------------|
| | | <i>1995</i> | <i>1996</i> | <i>1997</i> | <i>1998</i> | <i>1999</i> | <i>2000</i> | <i>2001</i> | <i>2002</i> | |
| NIC | US | 2 | 3 | 3 | 1 | 4 | 5 | | | 18 |
| | EU | | 2 | 4 | 3 | 3 | 1 | | 1 | 14 |
| | Canada | 1 | 1 | | | | | | | 2 |
| | Japan | | 1 | | | | | | | 1 |
| | DC | | | | | 1 | | | | 1 |
| | NIC | 1 | | | | | 1 | 2 | | 4 |
| | TEC | | | | 1 | | | | | 1 |
| | TLDC | 1 | 1 | | 1 | | | 4 | | 7 |
| | <i>total</i> | 5 | 8 | 7 | 6 | 8 | 7 | 6 | 1 | |
| TEC | US | | 1 | | | | 1 | | | 2 |
| | EU | | | | | | | | | 0 |
| | Canada | | 1 | | | | | | | 1 |
| | Japan | | | | | | | | | 0 |
| | DC | | 2 | | 1 | | | | | 3 |
| | NIC | | 2 | | | | | | | 2 |
| | TEC | | | | 2 | 1 | | 2 | | 5 |
| | TLDC | 1 | | | | | | | | 1 |
| | <i>total</i> | 1 | 6 | 0 | 3 | 1 | 1 | 2 | 0 | |
| TLDC | US | | 4 | 4 | | 1 | 1 | | 1 | 11 |
| | EU | | 1 | 5 | 4 | | 1 | | | 11 |
| | Canada | | | 1 | | | | | | 1 |
| | Japan | | 2 | | | | | | | 2 |
| | DC | | | 3 | | | | | | 3 |
| | NIC | | 4 | | 1 | 3 | 5 | 1 | 1 | 15 |
| | TEC | | | | | | | | 1 | 1 |
| | TLDC | | 1 | | | 2 | 4 | 5 | 2 | 14 |
| | <i>total</i> | 0 | 12 | 13 | 5 | 6 | 11 | 6 | 5 | |
| <i>Total</i> | | 25 | 54 | 46 | 44 | 35 | 30 | 28 | 34 | |

Annex B

I. Regression Run on All Years All Cases

| Dependent Variable | Explanatory Variables | | R2 |
|--------------------------------|-----------------------|--------------|--------|
| Number of Cases by Complainant | Intercept | Export Share | 0.8012 |
| | 0.0214 | 4.1564 | |
| | 0.0603 | 22.8031 | |
| Number of Cases by Respondent | Intercept | Import Share | 0.8858 |
| | -0.0467 | 3.9601 | |
| | -0.1812 | 31.6380 | |

II. Regression Run on Years from 95-98 All Cases

| Dependent Variable | Explanatory Variables | | R2 |
|--------------------------------|-----------------------|--------------|--------|
| Number of Cases by Complainant | Intercept | Export Share | 0.8242 |
| | -0.2101 | 2.7859 | |
| | -0.9545 | 24.5912 | |
| Number of Cases by Respondent | Intercept | Import Share | 0.8252 |
| | 0.0516 | 2.0668 | |
| | 0.2992 | 24.6801 | |

III. Regression Run on Years from 99-02 All Cases

| Dependent Variable | Explanatory Variables | | R2 |
|--------------------------------|-----------------------|--------------|--------|
| Number of Cases by Complainant | Intercept | Export Share | 0.6710 |
| | 0.2315 | 1.3705 | |
| | 1.4100 | 16.2200 | |
| Number of Cases by Respondent | Intercept | Import Share | 0.7391 |
| | -0.0983 | 1.8933 | |
| | -0.4820 | 19.1145 | |

IV. Regression Run on All Years BUT Only Trade Defense Cases

| Dependent Variable | Explanatory Variables | | R2 |
|--------------------------------|-----------------------|--------------|--------|
| Number of Cases by Complainant | Intercept | Export Share | 0.7595 |
| | 0.1409 | 1.1702 | |
| | 1.2503 | 20.1817 | |
| Number of Cases by Respondent | Intercept | Import Share | 0.7427 |
| | -0.1632 | 1.7037 | |
| | -0.8974 | 19.2969 | |

V. Regression Run on All Years BUT Only NON Trade Defense Cases

| Dependent Variable | Explanatory Variables | | R2 |
|--------------------------------|-----------------------|--------------|--------|
| Number of Cases by Complainant | Intercept | Export Share | 0.7577 |
| | -0.1195 | 2.9862 | |
| | -0.4136 | 20.0849 | |
| Number of Cases by Respondent | Intercept | Import Share | 0.8197 |
| | 0.1165 | 2.2564 | |
| | 0.6070 | 24.2191 | |

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